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No. 97-1178

In The

Supreme Court of the United States

October Term, 1997

ROCKWELL INTERNATIONAL CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK J. MACDOUGALL
THOMAS P. MCLISH
AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1333 New Hampshire Ave., NW, Suite 400
Washington, DC 20036
(202) 887-4510

HAROLD A. HADDON
(Counsel of Record)
TY GEE
HADDON, MORGAN & FOREMAN, P.C.
150 East 10th Avenue
Denver, CO 80203
(303) 831-7364

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT

The government's brief in opposition to the petition for a writ of certiorari concedes a circuit "confusion" on the important issue of whether appellate review of a district court's reading of a written plea agreement should be *"de novo"* or only for "clear error." The government attempts to evade a direct discussion of the second issue posed, as to which there is also an intercircuit disagreement – whether the "parol evidence rule" bars extrinsic evidence offered to show a criminal defendant's reasonable understanding of a written plea agreement. Both of these issues are squarely presented in this case.

Rockwell International reasonably believed that its plea agreement precluded government intervention in a factually related *qui tam* action absent substantial new evidence of fraud. Rockwell attempted to show there was no "new evidence" and that tardy government intervention was based on pretext. Rockwell further attempted to show that government prosecutors both induced and shared Rockwell's understanding of the declination provision in the plea agreement at the time the plea was tendered and accepted. All Rockwell's evidence was expressly excluded in the district court and the court of appeals below under an incorrect and rigid application of the "parol evidence rule." Moreover, the court of appeals refused to consider *de novo* whether the declination provision in the plea agreement was merely a meaningless "statement of fact" as opposed to a promise that had context and significance for future government intervention.

From the confluence of these two erroneous legal rulings flowed a fundamentally unfair result which merits plenary review.

ARGUMENT

I. The government's arguments, which concede the intercircuit conflict over the proper standard for reviewing plea agreements, neither resolve the circuit conflict nor remedy the injury to petitioner from the Tenth Circuit's application of the wrong standard.

The government concedes the circuit conflict on a significant issue of criminal law – whether "clear error" or "*de novo*" should be the appellate standard for reviewing interpretations of written plea agreements. *See* Opp. 11 & n.7.

In opposing this Court's resolution of this circuit conflict, the government interposes two arguments.[1] The

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[1] In a footnote, the government also mounts an oblique challenge to the district court's subject-matter jurisdiction, suggesting that the district court had no jurisdiction under 18 U.S.C. § 3231 (1994) or any of the cases cited in the petition. *See* Opp. 5 n.5. This is a strange position for the government to take after it *affirmatively asserted* in the Tenth Circuit that the district court had jurisdiction:

> The district court had jurisdiction over the underlying case here pursuant to 18 U.S.C. § 3231, because [Rockwell] was charged with criminal violations of federal statutes. *The district court had jurisdiction under that same statute over Rockwell's motion to enforce the plea agreement filed in the underlying criminal proceedings.*

Tenth Cir. Answer Brief, at [1] (emphasis supplied). The government conceded subject-matter jurisdiction before the district court too.

In any event, the authorities cited in the petition establish the district court's subject-matter jurisdiction over the motion to enforce the plea agreement that the district court specifically approved, *see* Fed. R. Crim. P. 11. *See* Pet. 9; *see also United States*

government's first argument is that "[a]lthough there does appear to be confusion among the courts of appeals as to the proper standard of appellate review," this confusion does not "appear" to be a "clearly developed" circuit conflict. Opp. 11 n.7. Whatever the "appearances" of the conflicting case law from the government's perspective, the reality is that, for some time, the Seventh and Ninth circuits have held that the proper standard for reviewing plea agreements is "clear error." The Tenth Circuit in 1995 abandoned *"de novo"* review and joined the Seventh and Ninth circuits in applying the "clear error" standard. In *Rockwell*, 124 F.3d 1194, it reaffirmed that it stands abreast with those circuits and at odds with the five other circuits applying *"de novo"* review.

This is not the consistency in the criminal justice system that *Ornelas v. United States*, 116 S. Ct. 1657 (1996), had in mind, or the kind of "[p]roper[] administ[ration]" of the plea-bargaining process that *Blackledge v. Allison*, 431 U.S. 63, 71 (1977), envisioned.

The government's other argument is that this case is not a "suitable vehicle" for addressing the "clear error"-*de novo* question this case squarely presents, "because petitioner would not be entitled to relief even under the approach he advocates." Opp. 12. This argument is grounded on the government's guesswork – based on its ponderous and contextually misleading parsing of the Tenth Circuit's opinion – that the Tenth Circuit would have affirmed the district court's interpretation of the plea agreement even if the Tenth Circuit had applied the more demanding *de novo* standard. *See* Opp. 13.

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v. Moscahlaidis, 868 F.2d 1357, 1361-62 (3d Cir. 1989); *cf. Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1010 (1998).

To support its argument, the government mixes and matches pieces from the *Rockwell* opinion to manufacture an imaginary "summary" of the opinion that masks the Tenth Circuit's adoption of the "clearly erroneous" review standard. The government leaves out, however, the Tenth Circuit's central holding on the principal issue before it – what did the parties intend when they inserted the declination provision immediately after the provision generally excluding *Stone* from the plea agreement? The Tenth Circuit's holding was quite clear:

> The district court considered the [declination provision] and found it to be not a promise, but a statement of fact. *Such an interpretation of the agreement is not clearly erroneous.*

Pet. App. 11a (emphasis supplied).

In arguing that the Tenth Circuit might reach the same conclusion even applying the *de novo* standard, the government relies on a statement subsequent to the court's holding: "In light of the agreement's complete integration into the writing, any understanding [that the government was prevented from intervening in *Stone*] is simply unreasonable." Pet. App. 13a. Seizing on the phrase "simply unreasonable," the government argues that this was the equivalent of *de novo* review of the district court's interpretation of the plea agreement.

The government's argument is meritless. First, as the government concedes, the Tenth Circuit did *not* apply the *de novo* standard – it applied a *clear error* standard. Opp. 13. Reading the Tenth Circuit's opinion as though it had applied a standard of review it rejected is not unlike reading tea leaves, a reading more convincing to the reader than to the listener. Second, it is the *district court's* interpretation of the agreement that must be reviewed *de novo*, not Rockwell's understanding of it. Third, even

assuming the Tenth Circuit concluded that the district court's interpretation of the agreement was "simply []reasonable," it begs the question whether the "reasonableness" of the district court's interpretation was a conclusion reached after a "clear error" review or a *de novo* review.

Finally, the government's argument is meritless because it reads only half of the Tenth Circuit's opinion. The government embraces the Tenth Circuit's conclusion that Rockwell's interpretation of the plea agreement was unreasonable. Yet it ignores the Tenth Circuit's other conclusion – that Rockwell's proffered evidence, rejected by the district court, compellingly demonstrated why Rockwell's interpretation *was reasonable*. Pet. App. 7a.

In any event, the government misreads this part of the Tenth Circuit opinion. What the Tenth Circuit found to be "simply unreasonable" was *any* interpretation of the plea agreement that relied on extrinsic evidence since, as it held, the parol evidence rule foreclosed consideration of such evidence to aid in interpreting the agreement. This strict application of the parol evidence rule, as we discussed in the petition and discuss below, has little to recommend it when a court is confronted with deciding the intentions of parties to a plea agreement. But the Tenth Circuit's refusal to consider probative extrinsic evidence has little to do with its use of the "clear error" standard to review the district court's interpretation of a plea agreement.

The government's arguments, in short, are not persuasive. Its guesswork over how the Tenth Circuit could have applied a standard it did not utilize neither resolves the circuit conflict nor remedies the injury to petitioner

from the Tenth Circuit's application of the wrong standard. When the government concedes the intercircuit "confusion"[2] and conflict, and when the circuit courts of appeal have failed to resolve this conflict over a lengthy period of time, this Court's guidance is essential.

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[2] The government itself seems to have fallen prey to the intercircuit confusion in this area. It contends that Rockwell's position is "substantial[ly] inconsisten[t]" because Rockwell argues that interpretation of a plea agreement is a question of law to be reviewed *de novo* while also arguing that the district court improperly applied the parol evidence rule to bar consideration of extrinsic evidence bearing on the meaning of Rockwell's plea agreement. Opp. 11 n.7.

There is no inconsistency here. The *de novo* standard of review is a concept quite different from the parol evidence rule. Parol evidence may be – and in this case the Tenth Circuit conceded that it was – relevant to the contracting parties' intentions and the proper interpretation of the plea agreement, and probative of Rockwell's reasonable understanding of the agreement. Pet. App. 7a. Rockwell, as a criminal defendant seeking to enforce a plea agreement, was entitled to use this evidence to show its reasonable understanding of the plea agreement.

When both the district court and the Tenth Circuit refused to consider the evidence bearing on the parties' intent, Rockwell had a right to expect that the Tenth Circuit would at least apply the standard of review – *de novo* – which would properly scrutinize the district court's interpretation of a plea agreement as a matter of law.

When the Tenth Circuit barred consideration of any parol evidence to help interpret the plea agreement and then applied a standard of review used for reviewing factual findings when no factual findings were made, there surely is no inconsistency in Rockwell's position that both of the Tenth Circuit's holdings resolved serious issues of criminal law that other circuits would have resolved differently.

II. The "strict" application of the parol evidence rule's use here was contrary to the due process clause and at odds with the "relaxed" application of the rule by other circuits.

The government misunderstands the issues we raise concerning the parol evidence rule. Rather than addressing the different positions on the rule the circuits have taken, the government simply argues in favor of one of the positions – the one that strictly applies the parol evidence rule to bar any extrinsic evidence.

The government argues that the parol evidence rule properly prevented Rockwell from "add[ing]" a term to the plea agreement. But this semantic argument does not enlighten – it merely paraphrases the strict version of the parol evidence rule the Tenth Circuit applied. The government does not attempt to explain how such a strict application of the rule squares with this Court's due process concern for defendants participating in the plea-bargaining system or how it furthers the goal of permitting such defendants to "get[] the benefit of [their] bargain[s]," *United States v. Hyde*, 117 S. Ct. 1630, 1634 (1997).

The facts – which neither the district court nor the Tenth Circuit would consider – demonstrate Rockwell's evidence was offered for interpretive purposes. The plea agreement contained language generally excluding the *Stone* case from the general release given by the government and then immediately afterward stated that "[a]fter an independent review, the Department of Justice-Civil Division has determined to file a notice in *Stone* declining to intervene." Pet. App. 4a. All the parties to the plea agreement indisputably knew such a declination was final and could only be reversed by "good cause," 31 U.S.C. § 3730(c)(3) (1994). The evidence Rockwell unsuccessfully proffered would have shown that $3 million was

paid for this provision and that both parties – Rockwell and the government prosecutors – understood that "good cause" could only be established by a showing that there was substantial new evidence of fraud. Rockwell's proffer also showed that there was no such "new evidence."

The question before the district court was, what did the parties intend to accomplish with this declination provision, a provision the parties intentionally included? The answer not being plain from the agreement itself, the district court was dutybound to determine – by considering *extrinsic evidence* – the parties' intentions in placing the declination provision in the plea agreement. *See United States v. Swinehart*, 614 F.2d 853, 858 (3d Cir.), *cert. denied*, 449 U.S. 827 (1980); *Kingsley v. United States*, 968 F.2d 109, 114-15 (1st Cir. 1992); *United States v. Garcia*, 956 F.2d 41, 42-44 (4th Cir. 1992).

Under *Santobello v. New York*, 404 U.S. 257, 262 (1971), *Mabry v. Johnson*, 467 U.S. 504, 509 (1984), and this Court's other plea-bargaining cases, the district court could not discharge its duty merely by dismissing – without considering any evidence on the parties' intent – the declination provision as "simply a statement of fact," Pet. App. 21a.

The answer to the question surely did not require the "add[ition]" of any terms to the plea agreement. It merely required the district court to determine the meaning of the declination provision by "plac[ing] [itself] in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described," *Nash v. Towne*, 72 U.S. (5 Wall.) 689, 699 (1866).

When plea agreements are made under the supervision of courts that test the agreements under the due

process clause, it makes no constitutional sense to inflexibly hold that whenever there exists an integration clause a defendant is foreclosed from proving its reasonable understanding of the agreement it struck with the government. In contrast, the "relaxed" application of the parol evidence rule – which three circuits,[3] in conflict with four others,[4] have adopted – is more faithful to the due process guarantee and would not have left outside the courtroom the most telling evidence of Rockwell's and the government's intent.

The harm is illustrated here. As the Tenth Circuit acknowledged, "[m]uch of the evidence offered by Rockwell to support its reading of the agreement explains why it believed that the declination of intervention included a limit on future intervention." Pet. App. 7a. "The proposed evidence include[d] correspondence . . . transcripts . . . and legislative history, *confirming Rockwell's reasonable understanding* . . . ." Pet. App. 7a-8a (emphasis supplied). The indiscriminate exclusion of evidence demonstrating a defendant's reasonable understanding of a provision in a plea agreement returns us to the ironies we addressed in the petition: a criminal defendant is

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[3] *Swinehart*, 614 F.2d at 858; *Kingsley*, 968 F.2d at 114-115; *Garcia*, 956 F.2d at 42-44.

The government's attempt to distinguish these three cases by combing their facts and pointing out factual dissimilarities is unpersuasive. The government does not argue – nor could it – that these cases strictly applied the parol evidence rule. Indeed, had they done so, the results would have been noticeably different. What these circuits did was reject the rigid, uncompromising and indiscriminate application of the rule to agreements entered into by criminal defendants, agreements that they held were functionally and constitutionally different from commercial contracts. *See Swinehart*, 614 F.2d at 858.

[4] *See* Pet. 19.

afforded no evidentiary means to prove its due-process-based reasonable understanding of the agreement it entered into; and the courts routinely apply a relaxed version of the parol evidence rule in civil cases which permits extrinsic evidence to determine the meaning of commercial contract terms.

CONCLUSION

The government's arguments leave us with two inter-circuit conflicts that create a plea-bargaining regime on which neither government prosecutors nor criminal defendants can rely for predictability or consistency in matters having to do with interpreting plea agreements. This is an untenable state of affairs for the plea-bargaining system.

This Court should grant a writ of *certiorari* to resolve the conflicts among the circuits that bear on a critical component of the criminal justice system – plea agreements.

Respectfully submitted,

HAROLD A. HADDON
(Counsel of Record)
TY GEE
150 East 10th Avenue
Denver, Colorado 80203
Telephone: (303) 831-7364
Facsimile: (303) 832-2628

MARK J. MACDOUGALL
THOMAS P. MCLISH
1333 New Hampshire Ave., NW, Suite 400
Washington, DC 20036
(202) 887-4510

Counsel For Petitioner